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In The
Supreme Court of the United States
October Term, 1963

No. 13

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, AND LARRY STARK, IN OPPOSITION

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In The
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No. 368

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1625, AFL-CIO, and WILLIAM TRAVIS, President of Retail Clerks International Association, Local 1625, AFL-CIO,

Petitioners,

v.

ALBERTA SCHERMERHORN, LOIS DEVITA, JOYCE E. THURO, and LARRY STARK,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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OPINION BELOW

The opinion and decision of the court below sought to be reviewed (Appendix to the Petition, pp. 1a-14a) is officially reported in 141 So.2d 269 (1962).

JURISDICTION

The judgment of the Supreme Court of Florida was entered on April 25, 1962, and has been stayed to enable petitioners to seek review in this Court. The jurisdiction of this Court is invoked by the Petitioners under 28 U.S.C. §1257 (3). The Respondents contend that this Court lacks jurisdiction since the decision of the Florida Supreme Court is not final within the meaning of 28 U.S.C. §1257 (3). See Argument and Reasons for Denying the Writ, I, pp. 7-9.

QUESTIONS PRESENTED

I.

Has jurisdiction of this Court been properly invoked when the decision of the Florida Supreme Court is not a final judgment or decree as defined under 28 U.S.C. §1257 (3)?

II.

When Section 14(b) of the Taft-Hartley Act authorizes states to enact right-to-work laws, and state courts have the right to interpret and construe state constitutional provisions, is the Florida Supreme Court authorized to interpret and construe a Florida right-to-work constitutional provision making "agency shop" contractual devices illegal and invalid?

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 12 of the Declaration of Rights of the Florida Constitution (§12, 25 Fla. Stat. Ann.) provides as follows:

> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

Section 14(b) of the National Labor Relations Act (61 Stat. 151, 29 U.S.C. §164) provides as follows:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

STATEMENT OF THE CASE

The statement of the case as set forth in the Petition (Pet., pp. 3-7) is inaccurate as the Petitioner refers to facts allegedly involved in the trial court level which are not contained in any Record presented to the Supreme Court of Florida or to this Court. The Record

Proper in this Court, insofar as the trial court is involved, filed pursuant to the requirements of Rule 21 (1), consists of the Respondents' Complaint for Injunction and Other Relief; the Petitioners' Motion to Dismiss; the Petitioners' Response to an Application for Temporary Injunction (not involved herein as a Temporary Injunction was denied by the trial court and the Respondents did not appeal from such denial); a union-management contract entered into between the Petitioners and an employer; and the Judgment for Defendant Petitioners entered by the trial court on December 23, 1960.

The Respondents, plaintiffs in the trial court, filed a Complaint in equity to enjoin the defendant labor union (a Petitioner herein), its president (a Petitioner herein), and FOOD FAIR STORES, INC., SOUTHERN DIVISION (who has not joined in the Petition) from enforcing the provisions of a collective bargaining contract between the union and Food Fair. The contract provision under attack provides that employees who are not union members *"shall be required to pay as a condition of employment, an initiation service fee and monthly service fees to the union"*, such amounts being equal to the initiation fees and monthly dues for union members. The plaintiff respondents are non-union employees of Food Fair. They contended that the "Agency Shop" provision of the contract violated the "Right-to-Work" provision of the Declaration of Rights of the Florida Constitution, Section 12. In addition to seeking an injunction, the plaintiffs prayed for a declaratory decree, an accounting and return of funds paid to the union by non-union members and for general relief.

A motion to dismiss the complaint was filed by all

the defendants on two grounds, first, that the matter was one within the exclusive jurisdiction of the National Labor Relations Board by virtue of the provisions of 29 U.S.C.A. §141-188, and second, that the "Agency Shop" contract provision did not violate Section 12 of the Declaration of Rights (R. 9-11). A Motion to Dismiss takes the place of the demurrer under old Florida practice and the purpose of a Motion to Dismiss a complaint is to ascertain if the plaintiffs have alleged a good cause of action. No testimony is received on a Motion to Dismiss. and the cause does not become at issue until the motion is ruled upon by the court, see R. App. 2-4.

The trial court granted the Motion to Dismiss and entered a Final Judgment wherein it was stated in part:

> "... the Complaint ... is hereby dismissed for the reason that the court finds that the agency shop clause, Section 2, Article 19 of the contract between the defendant Union and defendant Food Fair is not violative of the Florida 'right to work' law as contained in Section 12 of the Declaration of Rights of the Constitution of Florida ..." (R. 15-16)

The cause was appealed by the plaintiffs, respondents herein, to the District Court of Appeal, Third District. The District Court of Appeal heard arguments and filed an opinion in which the "Final Judgment" of the trial court was reversed and the cause remanded. Before that decision became final, the appellees (petitioners herein) filed a motion to the court to withdraw its opinion and transfer the appeal to the Florida Supreme Court, asserting that the appeal should have been made directly to

the Supreme Court because the decision was "one construing a controlling provision of the Florida Constitution," Article V, Section 4, Florida Constitution. The District Court granted the Motion and transferred the cause to the Supreme Court, and entered an order withdrawing its opinion, conditioned upon the Supreme Court accepting jurisdiction. The Supreme Court determined that it had the requisite appellate jurisdiction.

After oral argument and due deliberation, the Supreme Court held that the "Agency Shop" contract provision violated the state's Right-to-Work constitutional safeguard,[1] adopted in *haec verba* the vacated decision of the District Court, and remanded the cause back to the trial court for further proceedings not inconsistent with their opinion (R. 24-34). After petitioners notified the Florida Supreme Court of their intention to petition this Court for a Writ of Certiorari, the Florida Supreme Court stayed the issuance of their Mandate to the trial court.[2]

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[1]Section 12, Declaration of Rights of Florida Constitution.

[2]The petitioners have sought to supplement the record to include the testimony of witnesses, depositions, exhibits, etc., used at a hearing on an application for temporary injunction but never used in connection with the Complaint and the Motion to dismiss. The Florida Supreme Court properly refused to supplement the record inasmuch as such suggested addition had not been before the Supreme Court when the case was argued by counsel and considered and disposed of by the Court. An order denying Petitioner's Motion to Supplement the Record was entered by the Supreme Court of Florida on August 13, 1962. See Respondents' Appendix, p. 1.

ARGUMENT AND REASONS FOR DENYING THE WRIT

I.

SINCE THE DECISION OF THE FLORIDA SUPREME COURT IS NOT FINAL, THE JURISDICTION OF THIS COURT HAS NOT BEEN PROPERLY INVOKED UNDER 28 U.S.C. §1257(3).

The decision of the Florida Supreme Court sought to be reviewed is not a final judgment or decree within the meaning of 28 U.S.C. §1257 (3). Therefore the Petitioners' attempt to invoke the jurisdiction of this Court under said section (Pet. p. 2) is improper.

As shown by the Complaint for Injunction and Other Relief filed in the trial court, the plaintiff Respondents prayed, inter alia, to enjoin the application of union-management contract provision, for a declaratory judgment, for an accounting, and for general relief (R. 1-8). The Petitioners filed a Motion to Dismiss the Complaint (R. 9-11) which Motion raised as a question of law, the sufficiency of the facts alleged to state a cause of action. The purpose of a Motion to Dismiss a complaint is to ascertain if the complaint alleges a good cause of action. *Connolly v. Sebeco, Inc.* Fla., 89 So.2d 482 (1956)

The trial Chancellor entered an order granting the Motion to Dismiss and entered a Judgment for Defendants (R. 15, 16). On appeal to the Supreme Court of Florida, the Judgment for the Petitioner Defendants was reversed and the *cause remanded to the trial court for*

further proceedings not inconsistent with the opinion. (R. 34)

For a decision of the highest state appellate court to be final within the meaning of 28 U.S.C. §1257 (3), it must end the litigation by fully determining the rights of the parties so that nothing remains to be done by the trial court except the ministerial act of entering the judgment which the appellate court has directed. See *Gospel Army v. City of Los Angeles*, 331 U.S. 543 (1947).

Under established Florida rule (similar to Federal rule) when a Motion to Dismiss is denied, the movent files an Answer incorporating any and all defenses and the cause then arrives at issue (see Appendix p. 4). The Florida Supreme Court in reversing the trial court and remanding the cause has merely opened the "pleading" door for the Petitioners to file an Answer and have the cause arrive at issue. The reversal of the trial court's ruling granting the Petitioners' Motion to Dismiss produced only the same effect as if the trial court had initially overruled the Motion to Dismiss and directed the Petitioners to file an Answer.

In injunction proceedings a judgment of the highest state court is final only where it effectively disposes of the action. Thus a judgment lacks finality if it does no more than rule on a motion to dissolve the injunction, regardless of how it decides that issue, leaving final disposition of the proceeding until later. *Gibbons v. Ogden*, 6 Wheat 448. We have not yet had the trial court either enter or deny a permanent injunction in the instant case, decide on an accounting or award damages.

Before this Court can exercise jurisdiction, it must be clear that definitive disposition has been made of *all* the legal and factual issues in the case, not just the important ones or the federal ones. Thus, the requirement of finality has not been met merely because one major issue in a case has been decided and a number of issues remain to be tied up. See *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948); *Bruce v. Tobin*, 245 U.S. 18 (1917).

Inasmuch as the cause has been remanded back to the trial court for "further proceedings" and the trial court's future role is more than the ministerial act of entering a judgment ordered by the appellate court, it is clear that at the present stage of the cause, it does not conform to the standards required for a final judgment under the Florida or Federal laws. Therefore, this case is not ripe for review as the Florida Supreme Court's opinion is not a final judgment for purposes of review under 28 U.S.C. §1257 (3). See *Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.*, 344 U.S. 178 (1952), dismissing as improvidently granted, a writ of certiorari to review affirmance of a temporary injunction.

II.

THE STATE COURTS HAVE THE FINAL SAY AS TO STATE PUBLIC POLICY AND TO THE MEANING OF RIGHT TO WORK PROVISIONS IN STATE CONSTITUTIONS.

The construction of state constitutional and statutory provisions is left to the states in the first instance, if

the state has authority to enact such law. See *Williams v. Oklahoma*, 358 U.S. 576, rehearing denied 359 U.S. 956 (1959).

Although the Petitioners have attempted to say in various and sundry fallacious ways that the Florida court does not have the authority to construe or interpret the Florida Right-to-Work constitutional safeguard, this Court has specifically directed that the Federal courts should not attempt to pass on the merits of any controversy involving such specific provision *until* the Florida courts had construed it. In *American Federation of Labor v. Watson* 327 U.S. 582 (1946), this Court discussed the Right-to-Work provision (Section 12 of the Declaration of Rights of the Florida Constitution) in a matter wherein a three-judge district court had passed on the merits of a controversy seeking to enjoin the enforcement of the constitutional safeguard.[1]

This Court held, inter alia, in reversing and remanding the cause with directions to retain the bill, pending the determination of state court proceedings, that:

> ". . . The merits involve substantial constitutional issues concerning the meaning of a new provision of the Florida constitution which, so far as we are advised, has never been construed

[1] That portion of Section 12 of the Declaration of Rights of the Florida Constitution which is in issue reads as follows:

> ". . . The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer."

by the *Florida courts. Those courts have the final say as to its meaning.* (327 U.S. at 767) (emphasis supplied)

* * *

" . . . A decision today on the constitutionality of this Florida law would be based on a preliminary guess concerning its meaning, not on an authoritative construction of it. We have already noted that this law may be so construed as to eliminate any conflict alleged to exist between it and the National Labor Relations Board." (327 U.S. at 598)

Based on the above direction of the United States Supreme Court and the provisions of Section 14(b) of the National Labor Relations Act, and its own inherent powers, the authority of the Florida Supreme Court to interpret and construe its own constitutional provision as invalidating the Agency Shop cannot be seriously or arguably contested.

Out of seven Supreme Court justices, two dissented to the majority opinion, with Justice O'Connell dissenting as to the appellate jurisdiction, but concurring on the merits, and Justice Thomas dissenting due to lack of jurisdiction. The Petitioners have adroitly sought to raise in their Petition through a footnote reference (Pet. p. 6) that the two dissenters did not state their reasons for dissenting and that they may have dissented because they may have agreed with the petitioners that the state courts have no jurisdiction to regulate the subject matter. Petitioners have apparently overlooked the copy of the letter

mailed to their counsel, Claude Pepper, dated May 10, 1962, from the Clerk of the Florida Supreme Court, advising them that the dissents referred to the jurisdiction of the court to consider and determine the appeal by reason of the provisions of Article V of the Florida Constitution as amended in 1956, restricting the jurisdiction of the Supreme Court.[4]

The electorate of Florida, in 1944, approved the Right to Work constitutional provision, believing that the Right to Work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Federal and State constitutions to secure. The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among

[4]Under date of May 10, 1962, the Honorable Guyte P. McCord, Clerk of the Supreme Court of Florida, addressed a letter to Counsel for the Respondents, copy of which was mailed directly by the Clerk to the Claude Pepper Law Offices, reading as follows:

"I am in receipt of your letter of the 8th requesting that I call to the attention of Justices Thomas and O'Connell their dissents to the main opinion because of your belief that they would wish to clarify their dissents. These dissents refer to the jurisdiction of this Court to consider and determine the appeal by reason of the provisions of Article V of the Florida Constitution as amended in 1956, restricting the jurisdiction of the Supreme Court. While the majority of the Court joined in the opinion of Mr. Justice Hobson, it was the privilege of these two justices to dissent, not necessarily on account of the justice or injustice of the opinion of the Court, but because they do not believe the Court has jurisdiction to consider and determine the appeal under the restricted jurisdiction set out in Article V."

these are life, liberty and the pursuit of happiness". This right, the right to work, is a large ingredient in the civil liberty of the citizen.

The right to work is equivalent to the right to eat and the right to eat and provide food, clothing and shelter for his dependents is man's most dominant urge. In a free country like ours, such a right should not depend on one's race, color, the lodge, craft, church or other organization to which he belongs. Such a requirement is contrary to the spirit of our institutions, the basis on which our democracy was founded and every impulse of the forefathers who gave it existence. We can think of nothing more out of harmony with true Americanism. Membership in one's church, lodge, craft or union may be a means of enlarging spiritual, cultural, physical and financial assets, but to make one's bread depend on church or union membership or forced payment of money to a union as a condition of employment would be the worst species of anti-Americanism.

When the petitioning union, a local of the Retail Clerks International Association, AFL-CIO, one of the wealthiest unions in America, seeks to have this Court invoke judicial notice that "*poverty stricken local unions*" (Pet. p. 21) face enormous obstacles in achieving equality of bargaining power and effective collective bargaining, without compulsory payments to a union via the agency shop, one must wonder what happened to the traditional democratic principle of voluntarism. Who should decide whether or not an individual joins and supports a particular private organization? Should the union decide? Should management decide? Should the union agent and management get together and decide? Or should the individual de-

cide for himself? The people of Florida have decided, as did the Supreme Court of Florida, that they, as individuals, are not to be coerced or intimidated in the enjoyment of their legal rights, including the right of free and voluntary decision as to whether or not they will join or support a union.

The strained and tortured reasoning of the Petitioners that money must be exacted from non-union members using the device or "gimmick" of the Agency Shop in order to assist the union in financing collective bargaining is fallacious. The freedom of individual and voluntary choice and decision is paramount to the union's alleged financing needs all of which is not used for collective bargaining expenditures. Furthermore, the union has not shown the reasonableness of any fee sought to be exacted. The record is barren of any showing of alleged benefits obtained from the union that the Respondents could not and would not have obtained without the union. But those are issues that are not involved herein. The Petitioner is correct when it states that under federal labor law, it must represent all employees whether union or non-union. Yet federal labor law did not give the unions the power to tax non-union members in a Right-to-Work state. The Petitioner is trying to clothe itself with governmental power. The power to tax is the exclusive power of the sovereign government and not the power of any private organization, such as the Petitioner union. The Bill of Rights of the United States Constitution protects the civil rights and liberties of individuals from governmental abuses and arbitrary compulsions and the Declaration of Rights of the Florida Constitution, and specifically, Section 12 thereof, protects the right of individuals, such as

the Respondents, from the Agency Shop compulsory exaction.

As stated by the Florida appellate court (141 So.2d at pages 272, 273) (Pet. App. p. 5a):

> "This section clearly bestows on the workingman a right to join or not to join a labor union, as he sees fit, without jeopardizing his job. Inasmuch as the Constitution has granted this right, the Agency Shop clause is repugnant to the Constitution in that it requires the non-union employee to purchase from the labor union a right which the Constitution has given him. The Constitution grants a free choice in the matter of belonging to a labor union. The agency shop clause contained in the contract under consideration purports to acknowledge that right, but in fact, abrogates it by requiring the non-union worker to pay the union for the exercise of that right, or, in the alternative, to be discharged from his employment. Such an arrangement is palpably and totally inconsistent with the freedom of choice contemplated by our Declaration of Rights, Section 12."

An alarming, if believed, but basic misconception was made by Petitioners in their Petition when they asserted that "In labor relations, as in all other aspects of political life, the power of the purse strings is the power to control." (Pet. p. 21). We cannot "buy" such misconception, and the large growth of the voluntary labor movement in this country belies the statement. Unions have increased in numbers and in economic and political as well as financial power in the last several

years as voluntary organizations. They have no need to compel unwilling workers to join and pay them dues. It is also hardly debatable that a voluntary organization of workers united for self-help is inherently a much stronger organization than a union composed to a considerable extent of coerced unwilling workers.

And as stated by Mr. Justice Frankfurter in a concurring opinion in the "Right-to-Work" case, *A. F. of L. v. American Sash & Door Co.*, 335 U.S. 538, 551 (1949), in quoting Mr. Justice Brandeis:

> ". . . the ideal condition for a union is to be strong and stable, and yet to have in the trade outside its own ranks an appreciable number of men who are non-unionists. . . Such a nucleus of unorganized labor will check oppression by the unions as the unions check oppression by the employer."

III.

CONGRESSIONAL INTENTION IS CLEAR THAT THE STATES ARE FREE TO PURSUE THEIR OWN RESTRICTIVE POLICIES IN THE MATTER OF UNION-SECURITY AGREEMENTS AND THAT SECTION 14(B) FORESTALLS FEDERAL PRE-EMPTION.

Under Section 14(b) of the Labor Management Relations Act,[5] Congress yielded to the states the authority to ban union-security and union-shop agreements, saying:

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[5]National Labor Relations Act as Amended, 1947, 61 Stat. 151, 29 U.S.C. §164.

> "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

It is by virtue of this provision that states are able to enact right-to-work laws, which escape the condemnation of the federal courts under the Petitioners' federal pre-emption theories. This provision is paramount to Section 8 (a)(3) of the Act. And as stated by this Court in the recent labor-management case of *Charles Dowd Box Co. v. Courtney*, 368 U.S., 82 S.Ct. 519, 523-4, decided February, 1962:

> "We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule."

Petitioners have sought to rely on the Colorado case of *Bldg. Construction Trades Council v. American Builders*, 139 Colo. 236, 337 P.2d 953 (1959) as authority for their contention that Section 14(b) merely authorizes the states to declare, as a matter of federal law, that agreements requiring "membership" are unlawful and that the states do not have jurisdiction. However, petitioners

failed to point out that Colorado does not have a Right to Work law.[6]

The motive and purpose of Section 14(b) is plainly to make effective the Congressional intent and public policy that the states are free to enact their own right-to-work laws and to restrict all forms of compulsory unionism as an exception to the protective federal policy of Section 8 (a) (3). When Congress enacted the 1947 changes to the National Labor Relations Act, it was well aware that broadly drafted right-to-work laws already existed.[7] Had Congress wished to deprive the states of authority to proscribe all forms of union security protected by section 8(a)(3), it could have done so expressly. Instead, the House Conference Report declared that section 14(b) was intended to "assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement" in a right-to-work state.[8] Congress, assuredly, believed that individual-security was and is superior to union-security.

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[6]Interestingly enough, the Colorado court said (337 P.2d at 360): "Colorado does not have a 'right to work' law. An agreement requiring membership in a labor organization as a condition of employment is under certain circumstances permitted in this state. C.R.S. '53, 80-5-6. *Said Section 14(b) only applies where such an agreement could not be executed or applied under any circumstances within the state.*" (emphasis supplied)

[7]House Report No. 345 on H.R. 3020, 80th Cong. 1st Sess.; 1 Legis. Hist. of LMRA 324-5, 331, 335. House Report No. 345 referred to at least 12 states (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Louisiana, Minnesota, Nebraska, North Dakota, South Dakota and Tennessee) having laws forbidding compulsory unionism.

[8]House Report No. 510 on H.R. 3020; 1 Legis. Hist. id. 564, see also 2 Legis. Hist. 1586.

Senator Taft, on the floor of the Senate, on June 5, 1947, summarized the new subsection (Section 14(b)) as making it perfectly clear that nothing in the act is to be construed as authorizing compulsory union membership agreements in States where the execution or enforcement of such agreements would be contrary to State law.[9] He went on to say that inasmuch as many States had enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in such states illegal, it was not the intent to deprive the States of such power.

The Petitioners, despite the clear intent and purpose of Congress, argue that Florida (the first State to enact a Right to Work constitutional provision in 1944) can be deprived of the power to make all forms of compulsory unionism, including the Agency Shop device, unlawful and illegal. We submit that if these proponents of compulsory unionism and the Agency Shop device have confidence in their argument addressed to this Court, they should address their argument to the electorate of Florida and/or to Congress. The endorsement of the electorate would be a vindication that the mandate of this Court could never give. See *A. F. of L. v. American Sash Co.*, 335 U.S. 538 at p. 553.

Congress passed Section 14(b) with its legislative eyes wide open. Congress certainly did not sponge out the State's powers as to the matters contained therein or say that the State's powers were pre-empted. If this Court would disregard the Section 14(b) policy explicitly set forth by Congress, then Congressional intention would

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[9]See P. 6602 of Congressional Record June 5, 1947, and P. 6679 of June 6, 1947; see also Vol. 2 of Legis. Hist. of LMRA pp. 1542, 1596.

be frustrated and State power wiped out. Section 14(b) policy-curbing of union interference with the right to work is to be scrupulously observed. By refusing to legislate beyond that, Congress did not forbid the States from declaring, enforcing, passing and interpreting Right-to-Work laws and constitutional provisions.[10]

The Petitioners lay great stress upon the case of *Hill v. Florida*, 325 U.S. 538, 542-543, decided in 1945 prior to the passage of Section 14(b). The *Hill* case did not concern itself with the Right-to-Work law and insofar as any alleged effect in the instant case (where Congress has placed a stamp of approval on State Right-to-Work laws), the *Hill* case has been essentially distinguished by the recent *De Veau v. Braisted*, 363 U.S. 144 (1960) decision. In *De Veau*, it was held that a New York statute prohibiting ex-felons from holding union office was not pre-empted by Federal Labor law. The statute had been included in a compact approved by Congress. It was contended that the *Hill* decision governed the case but such contention was given short shrift when this Court found that it would offend reason to attribute to Congress a purpose to pre-empt the state regulation. An element, most persuasive in the *De Veau* case that was not present in the *Hill* case, was the congressional approval of the heart of the state legislative program explicitly brought to the Court's attention. (See 363 U.S. at 155).

The element, most persuasive and conclusive in the

[10] The problem of employees who receive alleged benefits of union representation but who are unwilling to give financial support to the union has received much attention by Congress (See S.Rep. No. 105, 80th Cong. 1st Sess., pp. 411-413; H.R. Rep. No. 510, 80th Cong., 1st Sess., pp. 546, 547) and by the courts. See *Radio Officers v. Labor Board*, 347 U. S. 17.

case at bar, is the legislative history and the *intent of Congress* as expressed in Section 14(b), to preserve to the States the right to enact, apply and enforce Right-to-Work laws. This intent cannot be overlooked, ignored or swept away by judicial fiat.

No Federal Pre-emption.

Petitioners' main argument, variously phrased, is that the state courts of Florida have no jurisdiction on the ground of the exclusive authority of the National Labor Relations Board (Pet. 16-19). Petitioners charge that the instant case requires the application of the doctrine of federal pre-emption "to preserve the exclusive jurisdiction of the Labor Board to administer federal law." (Pet. 19). This charge is incorrect. The substantive issue involved was heretofore presented and decided by this Court in *Algoma Plywood & Veneer Co.* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1948).

At every stage of the proceedings in *Algoma Plywood*, the Union and the Company contested the jurisdiction of the State Employment Relations Board on the ground of the exclusive authority of the National Labor Relations Board. The case involved a form of compulsory unionism and union security, to-wit, a maintenance of membership clause. This Court ruled that union security arrangements were not protected by the National Labor Relations Act and that the states were therefore free to prohibit or restrict such arrangements. Since the operative facts in *Algoma* occurred prior to the 1947 Taft-Hartley amendment to the Act which introduced Section 14(b), the decision was that neither Section 7 nor Section 8(a)(3) of the Act, on which Petitioners here rely, in any way lim-

ited the right of a state to restrict or to prohibit any form of union security. In rejecting the precise argument advanced in *Algoma*, the same as advanced here, the Court stated (336 U.S. at 307):

> "It is argued therefore, that a State cannot forbid what §8(3) affirmatively permits. The short answer is that §8(3) merely disclaims a national policy hostile to the closed shop or other forms of union-security agreement . . ."

This Court viewed Section 14(b), added in 1947 by the Taft-Hartley amendment, as confirming the rights of the states to impose restrictions on union security arrangements beyond those set forth in the Act. The opinion states (336 U.S. at 313-314):

> "Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because §8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, §14(b) was included to forestall the inference that federal policy was to be exclusive . . ."

The dissenting opinion in *Algoma* expressly recognized that, even assuming the correctness of the pre-1947 administrative interpretation of Section 8(3) of the Act (rejected by the majority of seven justices but here pressed by the Petitioners), the addition of Section 14(b) by the 1947 Taft-Hartley amendment removed any ques-

tion as to the validity of state restrictions on union-security arrangements, stating (336 U.S. at 325):

> "... The Taft-Hartley Act expressly granted the states more leeway in regard to enforcement of their own policies as to contracts of the type here involved. 61 Stat. 136, 151, 29 U.S.C. §164. And the National Labor Relations Board has now construed the new federal act as precluding such contracts to the same extent that they are precluded by state law ..."

The Florida appellate courts have repeatedly recognized the doctrine of federal pre-emption and ceded jurisdiction to the National Labor Relations Board in cases where it was shown to be required.[11] However, the question of jurisdiction has been decided contrary to the pre-emption doctrine in three recent "Right to Work" cases in appellate courts in Arizona, Indiana and Kansas,[12] in addition to this Florida decision sought to be reviewed. The Florida court properly held, as did the other appellate courts, that the *Algoma* case has never been expressly overruled (as contended by Petitioners) and that *Algoma* has repeatedly been recognized and cited with apparent approval in later United States Supreme Court cases. See *Colgate-Palmolive-Peet Co.* v. *N. L. R. B.*, 338 U.S. 355

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[11] See *Amalgamated Clothing Workers, etc. v. La Vigne*, 111 So.2d 462 (1958); *Casteel v. United Brotherhood of Carpenters & Join.*, 125 So.2d 123 (1960); *North Dade Plumbing, Inc., v. Bowen*, 116 So.2d 790 (1960); *Scherer & Sons, Inc. v. International Ladies' G. Wkrs.*, 142 So.2d 290 (1962).

[12] *Sheet Metal Workers International Ass'n. v. Nichols* (1961) 89 Ariz. 187, 316 P.2d 204; *Meade Electric Company v. Hagberg* (1959) 129 Ind. App. 631, 159 N.E.2d 408; *Higgins v. Cardinal Manufacturing Company* (1961) 188 Kan. 11, 360 P.2d 456, certiorari denied (1961) 368 U.S. 829.

(1949); *Garner* v. *Teamsters C. & H. Union*, 346 U.S. 485 (1953); *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 477 (1955); *Guss* v. *Utah L. R. B.*, 353 U.S. 1, 10 (1957); *Local 24 of I. B. of T. C. W.* v. *Oliver*, 358 U.S. 283 (1959); *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

As late as 1959, in the *Oliver* case, in footnote 10, it was said (358 U.S. at 296):

> "In Algoma, state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the States through §8(3) of that Act, 49 State. 452. Questions of the nature that we consider today were expressly left open, 336 U.S. at 312."

As recently as October, 1961, Petitioner's identical contentions that the *Algoma* case cannot be relied on by the State Courts and that the Taft-Hartley act has preempted State jurisdiction, was presented to this Court in a labor organization's Petition for a Writ of Certiorari to the Supreme Court of Kansas involving a Right-to-Work case on all fours with the instant case. In *Higgins* v. *Cardinal Manufacturing Company*, 188 Kan. 11, 360 P.2d 456 (1961) cert. denied 368 U.S. 829, the Kansas Supreme Court found that an Agency Shop device was illegal and unlawful and in violation of the Kansas Right to Work constitutional provision. The Kansas court further found that Section 14(b) of the Taft-Hartley Act preserved the

jurisdiction of the states in matters involving state "Right-to-Work" provisions. This Court, after full and deliberate consideration, denied the Petition for a Writ of Certiorari. See *Gen'l. Drivers Automotive, etc., et al* v. *Higgins, et al*, 368 U.S. 829 (1961). Consequently, the question of the illegality of an "Agency Shop" in a Right-to-Work state and the pre-emption doctrine allegedly related thereto, has already been decided and determined by this Court and the decision of the Florida Supreme Court does not conflict with, but accords with national labor policy and the decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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September 18, 1962

APPENDIX

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1962

MONDAY, AUGUST 13, 1962

SCHERMERHORN, et al.,

Appellants,

vs.

RETAIL CLERKS LOCAL 1625, et al.,

Appellees.

Appellees' motion to supplement the record to be certified to the United States Supreme Court is denied. The suggested additions to the record were not before this Court when the case was argued by counsel and considered and disposed of by this Court.

Pertinent statutes, in addition to those set forth in the brief are as follows:

Florida Statutes Annotated — Florida Rules of Civil Procedure, 1954.

Rule 1.8 GENERAL RULES OF PLEADING

"(a) *Forms of Pleadings.* Forms of action and technical forms for seeking relief and of pleas, pleadings or motions are abolished.

"(b) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original

claim, counter-claim, or cross-claim, must state a cause of action, and must contain allegations of fact sufficient to show the jurisdiction of the court. It shall set forth a short and plain statement of the ultimate facts on which the pleader relies, and if it informs the defendant of the nature of the cause against him, it shall be held sufficient. It must contain a demand for judgment or decree for the relief to which the pleader deems himself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to pray for general relief.

"(c) *The Answer.* In his answer a pleader shall state in short and plain terms his defenses to each claim asserted, and shall admit or deny the averments on which the adverse party relies. Should the defendant be without knowledge, he shall so state, and such statement shall operate as a denial. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, he shall specify so much of it as is true and material, and shall deny the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, he may make his denials as specific denials of designated averments, or he may generally deny all of the averments except such designated averments as he expressly admits; but, when he does so intend to controvert all of its averments, including averments of the grounds upon which

the Court's jurisdiction depends, he may do so by general denial."

Rule 1.11 DEFENSES

"(a) *When Presented.* A defendant shall serve his answer within twenty days after service of the summons and complaint upon him, or not later than the date fixed in a notice by publication, which date shall be not less than twenty-eight nor more than sixty days after the first publication of the notice. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim within twenty days after service of the counterclaim, or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule (except a motion for judgment or decree on the pleadings) alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within ten days after the service of the more definite statement.

"(b) *How Presented.* Every defense, in law or fact, to a claim for relief in any pleading,

whether a claim, counter-claim or cross-claim, shall be asserted in the responsive pleading thereto if one is required; except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, (7) failure to join indispensable parties. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief."

Rule 3.8

When Cause Deemed at Issue.

"If at the expiration of 20 days from the service of the answer no counterclaim has been served or, if counter-claim has been served, then at the expiration of 20 days from the service of the reply thereto, the cause shall be deemed at issue. If, however, within such period of 20 days a motion permitted by these rules is served, the cause shall not be deemed at issue until the points of law so presented shall be ruled upon by the court."